Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-45–05 OF 2022(W)
VERNON ONG, HASNAH HASHIM AND MARY LIM FCJJ
4 APRIL 2023

Companies and Corporations — Liquidation — Proof of debt ('POD') — Liquidators after admitting POD notified creditor that only small portion of its POD claim would be paid whilst the rest would be deducted for payment of fee under creditor's subcontract as well as for more than 20 years of interest for late payment of that fee — Whether liquidators' decision was arbitrary and invalid and breached Companies (Winding-Up) Rules 1972 ('WUPR') — Whether any rejection of POD required liquidator under r 92 of WUPR to issue formal notice of rejection so that creditor could appeal to court against liquidator's decision within 21 days — Whether liquidators' action had denied creditor of that right of appeal — Whether liquidators were estopped, after having admitted POD, from later contending that POD claim was time-barred under Limitation Act 1953 — Whether liquidators could not arbitrarily impose interest to offset POD claim when there was no provision for payment of interest in the contract documents

The first respondent ('UEG') was appointed as the subcontractor to carry out mechanical and engineering ('M&E') works in a construction project in Vietnam. UEG, in turn, subcontracted its work to the appellant ('GIE'). When the construction project was suddenly terminated, the architects in charge of the project in November 2000 certified, among other things, the final amount the main contractor had to pay UEG for the M&E works. When the main contractor failed to pay the certified amount, UEG sued the guarantor ('Gammon') who had guaranteed the main contractor's due performance of the M&E subcontract, for the sum of USD995,879.39. UEG was subsequently wound up and the second and third respondents were appointed as its liquidators ('the liquidators'). GIE filed a proof of debt ('POD') for the sum of USD995,879.39 with the liquidators claiming that this was the amount due to it under the subcontract. Some years later, Gammon settled its suit with UEG by paying UEG USD1,215,000 pursuant to a consent judgment. Following that payment, the liquidators informed GIE that it would be paid a dividend of USD179,075.81 on its POD as the rest of its claimed amount would be deducted to settle a procurement fee of USD445,660.90 (that GIE had contracted to pay UEG under their subcontract) while a further USD371,142.66 would be deducted to settle interest on the late payment of the procurement fee. Contending that the liquidators were not entitled to make the said deductions on their own, GIE sued UEG/the liquidators. The

High Court held that GIE was entitled to be paid the sum it claimed in its POD and ordered UEG to pay GIE USD1,006,880 as special damages with interest. The Court of Appeal ('COA'), however, reversed the decision and held that the deductions made by the liquidators were proper and valid and that, in any event, GIE's POD claim was time-barred as it was based on the November 2000 architect's certificate of payment. GIE was granted leave to appeal to the Federal Court against the COA's decision on two questions of law: (a) whether a liquidator after accepting and not formally rejecting a POD could then invoke the Limitation Act 1953 to deny the POD claim; and (b) whether a liquidator could, as a commercial decision, unilaterally impose a sum as interest against a POD claim even though there was no contractual provision or other agreement for payment of interest.

Held, unanimously answering the leave questions in the negative, allowing the appeal with RM100,000 costs to be paid by the liquidators jointly and severally, setting aside the COA's decision and restoring the High Court's decision:

(1) If a liquidator decided to reject a POD, he was required under r 92 of the Companies (Winding-Up) Rules 1972 ('WUPR') to issue a notice of rejection of a proof of debt as prescribed in Form 59 to the creditor concerned stating the grounds for the rejection. The respondent liquidators did not comply with the WUPR and instead acted outside the purview of the law. They notified GIE that they had admitted the POD to the extent of only USD179,075.81 and that the balance monies over and above that figure were subject to deductions. If the liquidators intended to reject the amounts that were deducted they should have specifically stated so via Form 59. Furthermore, it was only in a subsequent letter from the liquidators' solicitors that GIE was notified that the entire sum it claimed in the POD was time-barred and that therefore no sum was owing to GIE by UEG (see paras 26–28).

(2) The requirement for the liquidator to give formal notice of rejection of a POD in Form 59 was to enable the affected creditor to appeal to court against the liquidator's decision within 21 days from the date of service of the notice of rejection pursuant to r 93 of the WUPR. In the instant case, the liquidators' failure to issue the notice of rejection denied GIE of that right to appeal (see paras 31–32).

(3) After having admitted the POD, the liquidators could not invoke s 6(1) of the Limitation Act 1953 to reject the POD on the basis that GIE's cause of action was time-barred. If the debt was in fact time-barred, the liquidators should have rejected the POD at the time it was filed in 2011 as they would have then had in their possession the relevant contract documents. It was only after the consent judgment was entered that the liquidators decided to notify GIE that the POD had been admitted in full

but subject to certain deductions. There was no mention of the claim being time-barred. The issue of limitation was raised after GIE had sued the liquidators. It was clearly an afterthought on the liquidators' part. Since the liquidators had admitted the POD and there was no formal rejection of GIE's claim, the liquidators were estopped from invoking the Limitation Act to reject the POD (see paras 36–39).

(4) The COA erred in holding that the liquidators could arrive at a commercially sensible conclusion by imposing payment of interest. Liquidators could not exercise their discretion arbitrarily but on just and equitable principles and if the POD was based on a contract, the decision taken by the liquidators should accord with the terms of the contract. The liquidator could not act outside the terms of the contract and impose terms that were outside its purview. In the instant case, the imposition of late payment interest on the procurement fee for more than a 20-year period was outside the scope of the terms of the subcontract and was not only incredulous but clearly unlawful (see paras 47–48 & 52).

[Bahasa Malaysia summary

Responden Pertama ('UEG') dilantik sebagai subkontraktor untuk menjalankan kerja mekanikal dan kejuruteraan ('M&E') untuk satu projek pembinaan di Vietnam. UEG, telah kemudiannya memberikan subkontrak untuk kerjanya kepada perayu ('GIE'). Apabila projek pembinaan tiba-tiba dibatalkan, arkitek yang bertangungjawab terhadap projek tersebut mengiktiraf, antara yang lain, jumlah akhir kontraktor utama perlu membayar UEG untuk kerja M&E. Apabila kontraktor utama gagal untuk membayar jumlah yang diiktiraf, UEG menyaman penjamin ('Gammon') yang menjamin perlaksanaan kontraktor utama untuk subkontrak M&E untuk jumlah USD995,879.39. UEG kemudiannya digulungkan dan responden kedua dan ketiga dilantik sebagai penyelesai. GIE telah memfailkan pensijilan hutang ('POD') untuk jumlah USD995,879.39 dengan penyelesai menuntut bahawa ianya merupakan jumlah yang terhutang kepadanya dibawah subkontrak. Beberapa tahun kemudian, Gammon menyelesaikan guamannya dengan UEG dengan membayar USD1,215,000 selaras dengan satu penghakiman persetujuan. Selepas pembayaran tersebut, penyelesai memaklumkan GIE bahawa ia akan dibayar dividen USD179,075.81 atas POD nya kerana keseluruhan jumlah yang dituntut akan ditolak untuk menyelesaikan satu fi pemerolehan bernilai USD445,660.90 (yang GIE telah dikontrakkan untuk membayar UEG di bawah subkontrak mereka) manakala USD371,142.66 akan ditolak untuk menyelesaikan faedah atas pembayaran lewat untuk fi pemerolehan. Menyatakan bahawa penyelesai tidak berhak untuk membuat penolakkan tersebut dengan sendirinya, GIE menyaman UEG/penyelesai. Mahkamah Tinggi memutuskan bahawa GIE berhak untuk dibayar jumlah yang dituntut dalam POD nya dan mengarahkan UEG untuk membayar GIE USD1,006,880 sebagai ganti rugi khas dengan faedah. Mahkamah Rayuan

('MR') menerbalikkan keputusan tersebut dan memutuskan bahawa penolakkan yang dibuat oleh penyelesai adalah sah dan teratur, dan dalam apa keadaan sekalipun, tuntutan POD GIE adalah dihalang had masa kerana ianya berdasarkan pensijilan pembayaran arkitek pada November 2000. GIE dibenarkan untuk izin untuk merayu ke Mahkamah Persekutuan terhadap keputusan MR atas dua persoalan undang-undang: (a) sama ada seorang penyelesai selepas menerima dan tidak menolak secara formal satu POD boleh kemudiannya menggunakan Akta Had Masa 1953 untuk menghalang tuntutan POD; and (b) sama ada seorang penyelesai boleh, sebagai satu keputusan komersil, secara sehala mengenakan satu jumlah sebagai faedah terhadap tuntutan POD walaupun tiada peruntukan kontrak atau apa-apa persetujuan lain untuk pembayaran faedah.

Diputuskan, sebulat suara menjawab soalan izin secara negatif, membenarkan rayuan dengan RM100,000 kos untuk dibayar oleh penyelesai secara bersama dan berasingan, mengenepikan keputusan MR dan mengekalkan keputusan Mahkamah Tinggi:

(1) Sekiranya penyelesai memutuskan untuk menolak satu POD, dia diperlukan di bawah k 92 Kaedah Syarikat (Penggulungan) 1972 ('WUPR') untuk mengeluarkan notis penolakan pensijilan hutang sepertimana diperuntukan dalam Borang 59 kepada pemiutang berkenaan dengan menyatakan alasan untuk penolakkan. Penyelesai responden tidak mematuhi WUPR dan sebaliknya bertindak diluar bidang kuasa undang-undang. Mereka memaklumkan GIE bahawa mereka telah menerima POD setakat mana USD179,075.81 dan bahawa baki wang lebih daripada jumlah tersebut tertakluk kepada penolakkan. Sekiranya penyelesai berniat untuk menolak jumlah yang ditolak, mereka sepatutnya menyatakan sedemikian melalui Borang 59. Lanjutan itu, ianya hanya dalam satu surat kemudian dairpada peguam penyelesai bahwa GIE dimaklumkan bahawa jumlah keseluruhan yang dituntutnya dalam POD dihalang had masa dan oleh demikian tiada jumlah yang terhutang kepada GIE oleh UEG (lihat perengan 26–28).

(2) Keperluan untuk penyelesai untuk memberikan notis formal penolakan POD dalam Borang 59 adalah untuk membenarkan pemiutang untuk merayu kepada mahkamah terhadap keputusan penyelesai dalam masa 21 hari dariapda tarikh penyerahan notis penolakkan selaras dengan kaedah 93 WUPR. Dalam kes ini, kegagalan penyelesai untuk mengeluarkan notis penolakan menafikan GIE haknya untuk merayu (lihat perengan 31–32).

(3) Selepas menerima POD, penyelesai tidak boleh bergantung kepada s 6(1) Akta Had Masa 1953 untuk menolak POD atas alasan bahawa kausa tindakan GIE dihalang had masa. Sekiranya hutang tersebut sebenarnya dihalang had masa, penyelesai sepatutnya menolak POD

pada masa ianya difailkan pada tahun 2011 kerana pada waktu tersebut, mereka septutunya mempunyai dalam milikannya dokumen kontrak yang relevan. Ianya hanya selepas penghakiman persetujuan dimasukki bahawa penyelesai membuat keputusan untuk memaklumkan GIE bahawa POD diterima sepenuhnya tetapi tertakluk kepada beberapa penolakkan. Tiada apa-apa pengataan bahawa tuntutan tersebut dihalang oleh had masa. Isu had masa dibangkitkan selepas GIE telah menyaman penyelesai. Ianya jelas merupakan sesuatu yang telah difikirkan terlebih dahulu pada pihak penyelesai. Memandangkan penyelesai menerima POD dan tiada penolakkan formal tuntutan GIE, penyelesai diestop daripada menggunakan Akta Had Masa untuk menolak POD (lihat perengan 36–39).

(4) MR terkhilaf apabila memutuskan bahawa penyelesai boleh tiba kepada kesimpulan yang masuk akal secara komersil dengan mengenakan pembayaran faedah. Penyelesai tidak boleh menggunakan budibicaranya secara sesuka hati tetapi atas prinsip adil dan saksama bahawa sekiranya POD tersebut berdasarkan kontrak, keputusan yang diambil oleh penyelesai sepatutnya selaras dengan terma kontrak. Penyelesai tidak boleh bertindak diluar terma kontrak dan mengenakan terma yang diluar bidangkuasanya. Dalam kes ini, mengenakan faedah pembayaran lewat atas fi pemerolehan untuk tempoh lebih dari 20 tahun diluar skop terma subkontrak dan bukan sahaja tidak masuk akal tetapi tidak sah di sisi undang-undang (lihat perengan 47–48 & 52).]

Cases referred to

Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor [2007] 2 MLJ 12, CA (refd)

Buchler and another v Talbot and others [2004] 1 All ER 1289; [2004] UKHL 9, HL (refd)

Feima International (Hongkong) Ltd (in liquidation) v Kyen Resources Pte Ltd (in liquidation) and others [2022] SGHC 304, HC (refd)

Lehman Brothers International (Europe) (in administration) and others, Re [2018] 1 All ER 205; [2017] UKSC 38, SC (refd)

Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation) (Metax Eco Solutions Pte Ltd, intervener) [2021] 4 SLR 556; [2021] SGHC 32, HC (refd)

Mosbert Berhad (in liquidation) v Stella D' Cruz [1985] 2 MLJ 446; [1985] 1 LNS 47, SC (refd)

Tanning Research Laboratories Inc v O'Brien (1990) 91 ALR 180, HC (refd)

Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd) [2020] 6 MLJ 168, FC (refd)

Torita Rubber Works Sdn Bhd v Chew Chong Eu [2009] 5 MLJ 208, HC (refd)

Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor [2013] 2 MLJ 629, FC (refd)

Legislation referred to

Companies (Winding-Up) Rules 1975 rr 91, 92, 93, 97, Forms 57, 58, 59

Companies Act 1965 (repealed by Companies Act 2016) s 487(3)

Limitation Act 1953 ss 2, 6(1), 6(1)(a), s 29

Appeal from: *UEM Genisys Sdn Bhd (in liquidation) & Ors v Genisys Integrated Engineers Pte Ltd* [2022] 4 MLJ 925 (Court of Appeal, Putrajaya)

Gideon Tan (with Brian Ernest Cumming and Ashvinpal Kaur) (Gideon Tan Razali Zaini) for the appellant.

T Baskaran (with Roveena Tara and Hanisah bt Mohd Rusli) (Baskaran) for the respondent.

Hasnah Hashim FCJ (delivering judgment of the court):

[1] The appeal raised questions of some significance relating to the duties and powers of a liquidator in respect of proof of debts lodged by creditors.

[2] On 26 April 2022, this court granted the appellant leave to appeal in respect to the following questions of law:

Question 1:

Can the Limitation Act 1953 apply to proof of debt which is accepted and not formally rejected by a liquidator?

Question 2:

Can the liquidators unilaterally impose interest on the basis of a commercial decision and at a rate unilaterally decided by them despite the absence of any contractual provision and/or agreement by the appellant?

THE FACTUAL BACKGROUND

[3] The facts are not complicated and mainly, undisputed. However, it is necessary to set out the material facts to appreciate the issues argued in this appeal. By a shareholders' agreement dated 2 November 1993 UEM Group Bhd formerly known as United Engineers (M) Bhd (UEM) and Genisys Integrated Engineers Pte Ltd (GIE) agreed to form UEM Genisys Sdn Bhd

A (UEG). UEM and GIE as shareholders held 51% and 49% of its shareholding respectively. GIE is also a contributory and creditor of UEG.

[4] Gammon Construction Ltd ('Gammon') and Road Builder (M) Sdn Bhd, established an unincorporated joint venture known as Gammon-Road Builder Joint Venture ('GRBJV'). GRBJV entered into an agreement with Vietnam-Malaysia Joint Venture Co Ltd ('Vimas') to perform works, described as the construction, completion and maintenance of an international class hotel in Hanoi, Vietnam ('main contract'). By an agreement dated 24 May 1996 GRBJV appointed UEG to undertake works under the main contract, in particular, to supply and install mechanical and electrical works ('the M&E contract'). UEG subcontracted the works under the M&E contract to GIE ('subcontract').

[5] In December 1996, GRBJV with the consent of Vimas, novated all its rights and obligations under the main contract to Gammon-CC1 Construction Co Ltd (Gammon-CC1). Subsequently by a written agreement dated 20 August 1997, GRBJV with the consent of UEG, novated all its rights and obligations under the M&E contract to Gammon-CC1. Pursuant to a guarantee also dated 20 August 1997, Gammon guaranteed Gammon-CC1's performance in respect of the M&E contract ('guarantee').

[6] On 13 April 1998, by an agreement between Vimas and Gammon-CC1, Gammon-CC1 ceased all their works on the Hanoi Sheraton Hotel Project and instructed their subcontractors, including UEG, to cease works. GDP Architects Sdn Bhd issued a certificate of payment dated 6 November 2000 ('the certificate of payment') certifying, inter alia, the final M&E contract sum and the final payment due and payable by the main contractor to UEG.

[7] However, Gammon-CC1 failed to make payment pursuant to the certificate of payment. UEG then commenced an action against Gammon pursuant to the guarantee to claim for the outstanding sum of USD995,879.39 which is the outstanding M&E contract sum vide Kuala Lumpur High Court Suit No D2–22–1556 of 2006 (Suit 1556).

[8] UEG was subsequently wound up on 20 October 2005. The second and third respondents (collectively referred to as 'liquidators') were appointed as UEG's liquidators.

[9] GIE lodged a proof of debt (POD) dated 28 March 2011 with the liquidators to claim the sum of USD997,750.70 which includes the outstanding sum of USD995,879.39. The POD sets out the claims as follows:

(a) RM3,065,11.99;

(b) GBP4533.63;

(c) SGD345,487.87; and

(d) USD997,750.70.

[10] At a creditors meeting held on 30 March 2012 with GIE, the liquidators notified the creditors that they were contemplating withdrawing Suit 1556 as the entitlement is only 3% of the procurement fees and that the claim may be barred by statutory limitations. However, on 5 August 2015 UEG and Gammon entered into a consent judgment in suit 1556 where it was agreed that a total sum of USD1,215,000 ('the consent judgment sum') will be paid by Gammon to UEG on or before 19 August 2015. Gammon paid UEG the full sum as stipulated in the consent judgment on 23 August 2015 together with interest of USD832.19 for delay in the payment. Four years after the POD was filed by GIE and shortly after the consent judgment was entered, the liquidators informed GIE that its claim for USD997,750.70 in the POD had been admitted to the extent of USD179,075.81 after deducting the procurement fee of USD445,660.90 (being the sum of 3% procurement fee) pursuant to cl 10(B) of the subcontract and interest of USD371,142.66 and a notice of dividend was issued for the sum of USD179,075.81 as the sum payable to GIE.

[11] GIE vide a letter dated 24 November 2015 accepted the amount payable as specified in the notice of dividend under protest and without prejudice to its rights inter alia on the basis that the liquidators were not entitled to charge interest on the procurement fee. GIE argued that the amount due and owing by UEG is USD995,879.38 and that under the subcontract the liquidators are not entitled to impose any interest for the procurement fee as the subcontract itself does not have any provision for the imposition of interest. However, without giving any reasons whatsoever the liquidators maintained their position and paid USD179,075.81 to GIE on 11 December 2015.

[12] The learned High Court judge allowed GIE's claim and found that GIE is entitled to the sum as claimed in the POD. GIE's claim was premised on the failure of UEG to fulfill its contractual obligations to pay the consent judgment sum and the additional interest pursuant to the subcontract. The consent judgment sum and the additional interest being rights and benefits arising from the contract. The High Court thus ordered UEG to pay GIE the sum of USD1,006,880 as special damages with interest.

[13] The High Court found that GIE's entitlement was not time-barred as it was not based on the architect's certificate of payment dated 6 November 2000

A but on the consent judgment entered. The liquidators ought to have taken the first step of notifying GIE of the rejection of POD by issuing the notice of rejection in Form 59. As that was not issued, r 93 of the Companies (Winding-up) Rules 1975 ('the WUPR') on appeal by the creditor was not available to assist GIE. It was only on 2 November 2015 that a formal reply was B given. The issue in any case had been ventilated at GIE's leave application at the winding up court and was thus res judicata.

[14] The liquidators were held to be personally liable for the costs of proceedings on an indemnity basis as their conduct had unnecessarily caused C GIE to commence their action. Their unreasonable and vexatious conduct was demonstrated by the deduction of the procurement fee despite knowing it was time-barred. When they were informed of the disagreement, they ought to have sought the court's direction pursuant to s 487(3) Companies Act 1965 D ('the CA') (then applicable). This was not done.

[15] On appeal, the Court of Appeal disagreed with the High Court and allowed the respondents' appeal. The Court of Appeal was of the view that limitation did not apply. UEG's deduction of USD445,660.90 for the E procurement fee was proper and valid as the liquidators had deducted the procurement fee from the sum received. The liquidators recovered the said sum when UEG sued the guarantor. It would have been inequitable for GIE to rely on limitation. On the other hand, GIE's claim in the POD is based on an Architect's Certificate dated 6 November 2000 and it was time barred. The F liquidators had also not acted mala fide or unreasonably.

[16] The Court of Appeal opined that the imposition of interest was a commercial decision and therefore justified.

G THE LEGAL FRAMEWORK

[17] The Companies (Winding-Up) Rules 1972 (WUPR) governs the pre and post-winding-up procedures. Rule 78 WUPR provides that every creditor shall prove his debt. In certain cases, the judge may give directions that debts be H admitted without proof. The mode of proof as prescribed under the WUPR is by submitting to the liquidator, an affidavit verifying the debt. Rule 81 of the WUPR provides that an affidavit proving a debt may be in the form prescribed and shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be I substantiated. The liquidator may at any time call for the production of the vouchers or any supporting documents.

[18] Rule 92 WUPR states that the liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit

or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds for the rejection.

Whether the Limitation Act 1953 applies to proof of debt that is accepted and not formally rejected by a liquidator?

[19] The argument on limitation arises in two respects. First, with regard to GIE's claim; second, in respect of UEG's deductions for the procurement fee. Both parties argued that the Limitation Act 1953 ('the Limitation Act') does not apply; but for different reasons. Counsel for GIE argues that GIE's claim is not time barred because its claim is premised on the consent judgment while UEG argues that the Limitation Act does not apply to the deductions because the deductions are conducted outside the aegis of the court, under the insolvency regime. In response to both arguments, the parties respectively argue that the claim is time-barred; UEG contending that GIE's claims arose from the architect's certificate; while GIE contending that UEG was not entitled to impose late interest charge on the payment of the procurement fee.

[20] More specifically, GIE contends that the consent judgment entered with Gammon is for works done under the subcontract. Based on the terms of the subcontract, UEG is obligated to pay the said sum to GIE. UEG is only entitled to the sum of USD29,876.38, which is the 3% procurement fee on the outstanding sum. Hence, the claim is not statutorily barred as it is not based on the architect's certificate of payment dated 6 November 2000 but based on the consent judgment dated 5 August 2015. This is specifically pleaded by GIE in its statement of claim. Furthermore, the POD was never formally rejected by the liquidators.

[21] The liquidators assert that they are entitled to deduct the procurement fee of USD445,660.90. The deduction was to recover the procurement fee without involving the courts. The liquidators further argued that the claim by GIE on 14 December 2017 was time-barred by virtue of s 6(1)(a) the Limitation Act as any payment under the architect certificate would have set in on 20 November 2006 as the cause of action accrued on 20 November 2000. Furthermore, it was argued that limitation does not arise in POD.

[22] The duty of a liquidator is primarily to manage the assets of the wound up company, investigate the affairs of the company, gather and realise the assets of the company, if necessary sell off the company's assets, distribute the proceeds, if any, and settle outstanding debts of the ailing company under his administration.

[23] The creditors of the wound up company are required by law to lodge a POD together with supporting documents to prove that the company in liquidation owes the creditor the sum as specified in the POD. Lodging a POD is a mandatory statutory process for a creditor of a wound up company. A POD is essentially a documentary declaration made by the creditor, towards establishing or proving the debt that the company owes to its creditors. The POD must be lodged by a creditor with the appointed liquidator and it details the debt owed by the wound up company together with supporting documents substantiating the debts so claimed.

[24] The objective of this exercise is to ensure that the assets of the wound up company are distributed fairly and justly amongst all creditors so that none of them will gain an advantage over the others. The Supreme Court in *Mosbert Berhad (in liquidation) v Stella D' Cruz* [1985] 2 MLJ 446; [1985] 1 LNS 47 explained that '... the primary object of winding up is the collection and distribution of the assets of the company pari passu amongst unsecured creditors after payment of preferential debts'. In other words, the creditor must satisfy the liquidator that the debt is provable and genuine. This is sometimes referred to as 'true liabilities' (see: *Tanning Research Laboratories Inc v O'Brien* (1990) 91 ALR 180).

[25] The procedures to claim any debt from the wound up company is well structured under the WUPR. The duty of the liquidator in making a decision and the right of a party to seek a court order to reverse or vary any decision of the liquidator is governed by r 92 of the WUPR. It is mandatory under the aforesaid Rules that the liquidator examine every proof of debt lodged with him, the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of the debt.

[26] The liquidator must meticulously examine the POD lodged by the creditor. After having examined the claim together with supporting documents, the liquidator must decide whether to accept or to reject the POD. If he decides to reject, he is legally required under the WUPR to state, in writing, to the creditor whose claim he has rejected, the grounds for the rejection. Under r 92 WUPR, the liquidator is required to issue a notice of rejection as prescribed in Form 59:

No 59
(Rule 92)
NOTICE OF REJECTION OF PROOF OF DEBT

TAKE notice that, as (Official Receiver and) Liquidator of the above-named company, I have this day rejected your claim against the company (a) (to the extent of $ .....) on the following grounds:

> And further take notice that subject to the power of the Court to extend the time, no application to reverse or vary my decision in rejecting your proof will be entertained after the expiration of (b).....days from this date.

[27] The respondents as the liquidators of UEG did not comply with the procedures provided under the Rules and instead took steps outside the purview of the law. The liquidators notified GIE they had admitted the POD to the extent of USD179,075.81 but subject to certain deductions, and issued the notice of dividend. The sum of RM916,803.57 was not rejected but deducted. If the intention of the liquidators was to reject the said sum as claimed in the POD then they must specifically state so in the form as prescribed under r 92 WUPR.

[28] However, it was only through the liquidators' solicitors vide a letter dated 5 December 2017, that they notified GIE that the sum claimed in the POD is time-barred as the cause of action against UEG had set in on 20 November 2006. As a consequence, there is no sum owing to GIE by UEG.

[29] GIE argued that its claim is not based on the subcontract but based on the consent judgment entered between UEG and Gammon on 5 August 2015. This is clearly and specifically stated in the statement of claim. Thus, limitation cannot apply as the POD was admitted and not rejected by the liquidators.

[30] Rule 91 of the WUPR provides that subject to the provisions of the CA and unless otherwise ordered by the court, the liquidator in any winding up may from time to time fix a day (which shall be not less than 21 days from the date of the notice) on or before which the creditors of the company are to prove their debts or claims or otherwise be excluded from the benefit of any distribution specified. The liquidator shall give notice of the day so fixed by advertisement in the *Gazette* in the prescribed form and in such newspaper as well as a notice in writing in either Forms 57 or 58 to every person who to the knowledge of the liquidator claims to be a creditor of the company and whose claim has not been admitted or, in a winding up by the court, to every person mentioned in the statement of affairs as a creditor who has not proved his debt.

[31] Where a creditor is dissatisfied with the decision of the liquidator rejecting his proof, he may appeal to the court to reverse or vary that decision within 21 days from the date of service of the notice of rejection. That 21 day period may be extended, on application, by the court. The liquidator may in such a situation make provision for the dividend upon such proof, and the probable cost of the appeal in the event of the proof being admitted. In the

A event no notice of appeal has been given within the time specified in this rule, the liquidator shall exclude all those proofs which have been rejected from participation in the dividend.

B **[32]** The court will not interfere with the decision of the liquidator unless the circumstances or the facts warrant it (see: *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12; *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629; and *Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd)* [2020] 6 MLJ 168). When the liquidators admit the POD, it is an acknowledgment of the debt. What had transpired in this appeal before us is that the liquidators failed to issue the notice of rejection in the prescribed Form 59 and as a consequence of the failure to issue the prescribed notice, UEG is denied the opportunity of applying to the court to reverse or vary the decision of the liquidator as no notice of rejection was ever issued. Rule 93 WUPR reads:

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> If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but subject to the power of the Court to extend the time, no application to reverse or vary the decision of the liquidator in a winding up by the Court shall be entertained, unless notice of the application is given before the expiration of twenty-one days *from the date of service of the notice of rejection*. (Emphasis added.)

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F **[33]** Under the WUPR, appeals must be made within 21 days from the date of service of the notice of rejection. The courts may extend the time but in the absence of any extension, a notice of application for the appeal must be submitted within 21 days. The liquidator then would have to file a memorandum of his disallowance of the POD within three days from the date he receives the notice of the creditors' appeals (see: Rule 97 of the WUPR).

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[34] The POD was filed on 28 March 2011. On 10 May 2012 the liquidators admitted a sum of RM755,059.89 and SGD250,373.48 referred to as the 'additional admitted amount'. Some other amounts had been admitted earlier whilst some others were rejected. However, in the same letter, the liquidators informed GIE that they had yet to decide on the claim of USD995,879.55 and SGD20,230.44 pending further verification and review and that a decision was expected by the end of May 2012.

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I **[35]** It was four years later in November 2015 that the liquidators informed GIE in writing that the claim amount of USD997,750.70 had been admitted to the extent of USD179,075.81. The liquidators rejected the claim of USD1,871.32. However, in respect of the balance of USD995,879.55, the said

sum was not rejected but a sum of USD816,803,57 was deducted for purpose of procurement fee due to UEG pursuant to cl 10(B) of the subcontract.

[36] It is quite clear in this appeal before us that the liquidators had obviously disregarded the procedures set out under the WUPR by failing to issue the mandatory statutorily required notices. Instead, after having admitted the POD the liquidators resiled from their position and relied on s 6(1) of Limitation Act, rejecting the POD on the basis that GIE's cause of action expired on 20 November 2006 and was thus time-barred. If at all the claim under the POD was time-barred it should have been rejected by the liquidators when the POD was filed in 2011 as the liquidators would have in their possession the relevant contract documents.

[37] It was only after the consent judgment was entered that the liquidators decided to notify GIE via a letter that the POD is admitted in full but subject to certain deductions. There was no mention of the claim being time-barred. The issue of limitation was raised after GIE filed the claim against the liquidators.

[38] Although the question for determination by this court is not directly on the compliance of the procedures under the WUPR but whether limitation applies to the POD admitted, our observations in this regard must be expressed. Limitation generally would apply to any cause of action filed after six years. If a POD has been accepted and has not rejected, then the liquidators cannot renege on a decision made as the liquidators of UEG and decide to rely on limitation two years later. If a liquidator rejects a POD based on limitation, he must state so in clear and uncertain terms in the notice of rejection. This was not done. It was clearly an afterthought by the liquidators.

[39] As the liquidators of UEG, the second and third respondents are obliged to perform their legal duties as provided under the statute. A liquidator's paramount duty is to administer diligently the affairs of the wound up company, to secure the assets of the company, and realise and distribute the surplus if any. He is required to act in a fair and honest manner and to be impartial and independent. At all times the liquidator must act in the interest of the wound up company, contributory, and the creditors and cannot profit from his office. The protocols in respect of accepting or rejecting POD are clearly provided under the WUPR. As liquidators, the respondents had flagrantly failed to comply with the procedures under the WUPR. The liquidators had admitted the POD of GIE. Having done so, the liquidators are estopped from availing themselves and invoking the statute of limitation to reject the said POD.

[40] The crux of GIE's claim is the failure of UEG to fulfill its contractual obligations. Under the terms of the subcontract between UEG and GIE, GIE has the same rights and benefits as UEG has against the main contractor under the M&E contract. It is also a term of the subcontract that UEG shall procure and ensure that the main contractor pays the M&E subcontract sum direct to GIE in accordance with the payment terms of the said M&E contract. GIE will, after the receipt pay UEG the procurement fees. The liquidators were well aware of the terms of the subcontract.

[41] The liquidators contended that they are entitled to deduct the sum of USD445,660.90 as the procurement fee is not caught by limitation as the deduction was made without the courts' involvement.

[42] We disagree. There was never any rejection of the sum claimed under the POD by the liquidators. The deduction by the liquidators is consequent to the consent judgment entered on 5 August 2015 in Suit 1556. GIE's claim is based on that consent judgment. UEG is only entitled to 3% procurement fee and the balance will be that of GIE. In our view, the very act of deduction from the sum claimed by GIE is a tacit admission of the sum claimed for otherwise there can be no deductions, to begin with. Such admission amounts to an acknowledgment that if the Limitation Act applies, and we will discuss this next, s 29 of the Limitation Act provides for a fresh accrual of action in which case, the claim is not time-barred.

[43] On the question of whether the Limitation Act applies, the language of the Limitation Act clearly provides that it is an Act providing for limitation of actions and arbitrations. Under s 2 of the Limitation Act, 'action' includes a suit or any other proceeding in a court of law. That is to say, it only applies to matters in a court of law. While liquidators may act in quasi-judicial capacities (see: Michael Murray & Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Thomson Reuters) (10th Ed, 2018)), the whole exercise of settling proofs of debts by the liquidator is still not an exercise 'in a court of law'. Even the liquidators argued that the deductions were outside the Courts' involvement.

[44] Since the object of proving debts is to determine the genuineness of the debt, the argument of limitation by the respondents is not maintainable. The same cannot be said for the deductions because the exercise is to deal with the claims against UEG and not claims by UEG against GIE or any other creditor (see: *Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation) (Metax Eco Solutions Pte Ltd, intervener)* [2021] 4 SLR 556; [2021] SGHC 32; *Feima International (Hongkong) Ltd (in liquidation) v Kyen Resources Pte Ltd (in liquidation) and others* [2022] SGHC 304; and *Torita Rubber Works Sdn Bhd v Chew Chong Eu* [2009] 5 MLJ 208).

[45] UEG must file in a court of law for its claim for the procurement fee. However, if at all, UEG is entitled, it is only for the 3% procurement fee. A

[46] In this appeal before us the POD has been admitted and the claims have not been formally rejected by the liquidators. Accordingly, the first question of law is answered in the negative that is, the Limitation Act 1953 does not apply to a proof of debt that is accepted and not formally rejected by a liquidator. B

Whether the liquidators can unilaterally impose interest on the basis of a commercial decision and at a rate unilaterally decided by them despite the absence of any contractual provision and/or agreement by the appellant? C

[47] The primary concern of a liquidator is to liquidate the company's assets in the most cost-saving and expeditious manner. As liquidators, the respondents cannot exercise their discretion arbitrarily but must be based on just and equitable principles, the interest of the wound up company is paramount. D

[48] A liquidator is the guardian of the assets of a wound up company. His duty is to ensure that if there are debts owing payments must be made once he is satisfied that the debts are provable debts and supported with evidentiary documents. The decision to admit a POD will be based on the documents before him. If the POD is based on a contract then he must meticulously examine the terms of the contract and decide based on the terms of the contract. He cannot act outside the terms of the contract and impose terms outside the purview of the contract. E F

[49] Lord Hoffmann in Buchler and another (as joint liquidators of *Buchler and another v Talbot and others* [2004] 1 All ER 1289; [2004] UKHL 9 at [28] explained: G

> The winding up of a company is a form of collective execution by all its creditors against all its available assets. The resolution or order for winding up divests the company of the beneficial interest in its assets. They become a fund which the company thereafter holds in trust to discharge its liabilities: *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167. It is a special kind of trust because neither the creditors nor anyone else have a proprietary beneficial interest in the fund. The creditors have only a right to have the assets administered by the liquidator in accordance with the provisions of the Insolvency Act 1986: see In re *Calgary and Edmonton Land Co Ltd (In liquidation)* [1975] 1 WLR 355, 359 ... H

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[50] Lord Neuberger in *Re Lehman Brothers International (Europe) (in administration) and others* [2018] 1 All ER 205; [2017] UKSC 38 explained:

> In my judgment, contrary to the conclusion reached by David Richards J, the contractual right to interest for the post-administration period does not revive or

survive in favour of a creditor who has proved for his debt and been paid out on his proof in a distributing administration. As already mentioned in In re Humber Ironworks LR 4 Ch App 643, 647, Giffard LJ, having held that a creditor could only prove for contractual interest up to the liquidation date, explained that '[t]hat rule ... works with ... fairness', because 'where the estate is solvent ..., as soon as it is ascertained that there is a surplus, the creditor ... is remitted to his rights under his contract'. However, as I have also explained, that observation was made in the context of a decision which was wholly based on what Giffard LJ expressly described as 'Judge-made law', because the contemporary statutory provisions gave no guidance as to how contractual interest was to be dealt with in a winding up. The position is, of course, very different now, especially in relation to interest on proved debts in liquidations and administrations.

[51] The issue before the Supreme Court in *Lehman Brothers* is whether a creditor of LBIE who had been entitled to, but had not been paid, statutory interest, can claim such interest in a subsequent liquidation. The Supreme Court concluded that the contractual right to interest for the post-administration period does not revive or survive in favour of a creditor who has proved for a debt and been paid on his proof in a distributing administration.

[52] The Court of Appeal in this appeal considered that the liquidators could arrive at a commercially sensible conclusion by the imposition of the interest as explained in their grounds of judgment. With the greatest of respect, we disagree. The approach taken by the Court of Appeal is clearly erroneous. The role of the liquidator is to ensure that all debts have been paid. To bring an ailing company under its management if possible back on its feet within the confines of the law and supporting documents justifying the debts. The imposition of the late payment interest for over 20 years is outside the scope of the terms of the subcontract, is not only incredulous but clearly unlawful. This is in addition to our observations that the POD exercise does not permit liquidators to assert a claim for the wound up company without filing a civil claim in court. We note that the liquidators never/are not asserting a right of set off or mutual credit; arguments which are popularly raised and dealt with by a court of law and not unilaterally by liquidators.

[53] The second question of law is answered in the negative.

CONCLUSION

[54] Having carefully considered the submissions of all parties and for all the reasons aforesaid we allow the appeal with costs of RM100,000 to be paid by the second and third respondents, jointly and severally, subject to allocator. We set aside the decision of the Court of Appeal and restore the decision of the High Court.

[55] My learned brother Vernon Ong Lam Kiat FCJ and my learned sister Mary Lim Thiam Suan FCJ have sight of the judgment in draft, concur with the reasons given and the conclusions reached.

Leave questions answered in the negative; appeal allowed with RM100,000 costs to be paid by the liquidators jointly and severally; COA's decision set aside; and High Court's decision restored.

Reported by Ashok Kumar